BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	

To the Commission:

REPLY OF THE AMERICAN PETROLEUM INSTITUTE TO OPPOSITIONS TO API'S LIMITED PETITION FOR RECONSIDERATION

The American Petroleum Institute (API), by its undersigned attorneys, responds to the Oppositions and comments of various parties to API's Limited Petition for Reconsideration of the Commission's *Report and Order* in this proceeding (API Petition).[1]

API's Petition was narrowly tailored to safeguard the interests of its members that negotiate customer-specific agreements. The Personal Communications Industry Association and CMRS providers Arch Communications Group, Airtouch Communications, Inc., and BellSouth Corporation and BellSouth Telecommunications, Inc. oppose API's Petition, arguing *inter alia* that a favorable ruling would preclude

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[1] *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) (*Universal Service Order* or *Order*).

providers of commercial mobile radio services (CMRS) operating in a detariffed environment from recovering their legitimate business expenses.[2] AT&T Communications, GE American Communications, and the Telecommunications Resellers Association also oppose the petition.

I. RESCUING CARRIERS FROM THEIR OWN CONTRACTS IS INCONSISTENT WITH PRINCIPLES OF DEREGULATION

The contracts which the various carriers wish to reopen apparently contain no "savings" provisions that would allow the carrier flexibility to respond to regulatory or legislative action. Nonetheless, both public policy and fundamental principles of contract law require that these contracts be honored. Rescuing these carriers from what they now perceive to be "bad deals" undermines the sanctity of contracts and is inconsistent with both detariffed and increasingly deregulated environments.

BellSouth asserts that universal service funding constitutes a new government mandate that "could not have been and was not anticipated when the contracts were made."[3] That claim rings hollow. All carriers and providers of interstate telecommunications services have been on notice *since at least February, 1996* that they

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[2] Unfortunately, none of these parties attached to its pleadings a copy of the typical CMRS contract for service. Most of these parties also requested that the Commission grant the Petition for Reconsideration filed by the Cellular Telecommunications Industry Association and "clarify" that it was preempting state law to the extent necessary to ensure that the carriers could pass-through universal service contributions to their subscribers. API opposes these requests.

[3] BellSouth's Comments on and Oppositions to Petitions for Reconsideration at 8. None of the pleadings filed by CMRS providers identifies the average term of a CMRS contract. Absent this and other information, it is unclear what percentage of contracts at issue have been entered into since February, 1996.

would be subject to such assessments. While the magnitude of that obligation may have been unclear, nothing prevented these carriers from modifying their standardized agreements to incorporate language protecting them in the event of adverse regulatory action. Their failure to do so should not now be rewarded, particularly because the Commission action necessary to do so penalizes those customers who have negotiated long-term telecommunications agreements.

II. CONTRACTS BETWEEN CARRIERS AND THEIR CUSTOMERS DO NOT FETTER CONGRESSIONAL AUTHORITY

A common theme in the CMRS providers' pleadings is the notion that the Commission can, and should, "reform" these contracts to advance the public interest, with case law cited for the proposition that contracts cannot "fetter" Congress' constitutional authority.[4] This authority is cited in lieu of reliance on either the *Sierra-Mobile* doctrine or the "substantial cause" standard of review, both of which appear inapplicable to CMRS contracts operating in a detariffed environment.[5]

Contract reformation as discussed in these pleadings would appear appropriate in those instance in which the parties are impermissibly attempting to "remove their transactions from the reach of dominant constitutional power."[6] Thus, to advance the

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[4] *See,* Comments of Arch Communications Group, Inc. on Petition for Reconsideration at 7-9; Airtouch Communications, Inc. Opposition to Petitions for Reconsideration at 8-9 (Airtouch Opposition).

[5] *See* Airtouch Opposition at 8-9.

[6] *Connolly v. PBGC,* 475 U.S. 211, 223-224 (1986), cited by Arch Communications at 8 and by Airtouch at 8, fn. 24.

public interest, the Commission might choose to "reform" a contract that defines a CMRS provider's services as something other than "interstate telecommunications services."

The pleadings, however, fail to explain how the contracts which the CMRS providers seek to re-open fetter Congressional authority. Nothing in an agreement to provide telecommunications services to a given customer for a given rate and term constitutes an attempt to "remove the transaction from the reach of dominant constitutional power." These contracts do not even attempt to preclude carrier contribution. Because these contracts do not undermine the Commission's implementation of universal service funding, no basis exists for contract reformation.

III. IT IS INEQUITABLE TO REOPEN CONTRACTS TO FLOW-THROUGH RATE INCREASES, BUT NOT RATE DECREASES

Airtouch contends that upholding contracts will give customers a "windfall not available to other customers."[7] It fails to offer any explanation why the carrier - despite its apparent oversight in drafting the controlling document - should receive that "windfall" to the detriment of the customer.

AT&T at least offers a partial explanation. It suggests that, because "many" customers contracts "may" anticipate access reductions, it was appropriate for the Commission to "create a *limited* exception to the *normal* doctrine that a carrier *may not typically* adjust rates in such a contract."[8] This statement inadvertently reveals the

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[7] Airtouch Opposition at 8.

[8] AT&T Opposition to Petitions for Reconsideration at 16 (emphasis added).

inequities inherent in relieving carriers from the obligation to comply with their contracts: carriers will "pass-through" rate increase attributable to USF contributions but not rate decreases attributable to lower access rates.

IV. THE ACT CLEARLY IMPOSES CONTRIBUTION REQUIREMENTS ON CARRIERS, NOT END USERS

Implicit in these arguments is the suggestion that the universal service funding obligation rightfully belongs on end users, in clear contravention of Section 254(d)'s unambiguous placement of the burden on "[e]very telecommunications carrier that provides interstate telecommunications services."[9] The Commission may extend that burden to "[p]roviders of interstate telecommunications if the public interest so requires." Nowhere in the Telecommunications Act of 1996 is the Commission granted the authority to place that burden on end users.

Despite the clear conflict with statutory language, a number of commenters advocate a mandatory end user surcharge in lieu of carrier contributions. AT&T contends that such a surcharge will, *inter alia,* moot allegations by customers "that a permissive pass-through of USF support obligations abrogates fixed-price contracts."[10] This

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[9] The Telecommunications Resellers Association advances this same argument in its Comments at 5 [Ad Hoc "in essence seeks insulation of large corporate telecommunications users from the USF funding obligations which all other end users will incur pursuant to the *Report and Order.*"] *See also* Airtouch's reference to the "no pay" arguments of API and Ad Hoc Telecommunications Users Group. Airtouch Opposition at 8.

[10] AT&T Opposition to Petitions for Reconsideration at iii, 15-16.

contention offers no basis for the Commission to impose a universal service support mechanism that, in practice if not name, violates the express language of the 1996 Act.

Implementation of a mandatory end user surcharge impermissibly transfers the contribution requirement from the carrier to the customer. This fundamental infirmity is not remedied by imposing upon carriers administrative functions such as end-user collection.[11]

V. A CONCLUSORY "PUBLIC INTEREST" FINDING DOES NOT CONSTITUTE SUBSTANTIAL CAUSE TO RE-OPEN A CONTRACT

GE American Communications (GE Americom) asserts that granting the petitions of API and Ad Hoc would "violate the takings clause by substantially increasing a satellite company's cost of doing business without giving it an opportunity to recover the new costs."[12] In support of these contentions, GE Americom recites standards and case law applicable to fully rate-regulated utilities. Assuming, *arguendo,* that these standards and cases even apply to GE Americom, they do not support a takings claim in the instant case. As MCI explains in its Opposition,

> Neither *Hope Natural Gas* nor any other Supreme Court case, however, suggests that the rate of return that the Commission has deemed to be "just and reasonable" represents the constitutional minimum and that any rate of return that falls below that number is therefore confiscatory. . . .

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[11] Opposition of Bell Atlantic to Petitions for Reconsideration at 10.

[12] GE Americom does not designate its regulatory status. Comments regarding an entitlement appear inconsistent with subsequent statements on page 10 regarding "[l]ong-term private contracts" between satellite operators and their customers.

> As the Court held in *Hope Natural Gas,* "regulation does not insure that the [regulated] business shall produce net revenues." Thus, any takings claim premised upon entitlement to a guaranteed profit - let alone a takings claims premised upon an entitlement to a 11.25% rate of return - must fail.[13]

Alternatively, GE Americom contends that the universal service contributions constitute "significant, externally-imposed cost changes" that constitute "substantial cause" for a public interest justification to modify its fixed term contracts. However, the "substantial cause" doctrine requires a carrier-specific, fact-based investigation, not just a conclusory public-interest recitation of the type found in Paragraph 851 of the *Universal Service Order.*

> [I]n the *Interexchange Reconsideration Order* the Commission stated that it would "consider on a case-by-case basis in light of all relevant circumstances whether a substantial cause showing has been made" that would permit a carrier to alter unilaterally the material terms of a contract-based tariff. While the Commission found that "commercial contract law principles are highly relevant to an assessment of whether a contract based tariff revision is just and reasonable under the substantial cause test," the Commission decided that it was not prepared to hold "that these principles provide definitive parameters for a substantial cause showing." The Commission noted that "(a)pplication of the substantial cause test depends upon the equities of the particular situation."[14]

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[13] MCI Opposition at 3 (citations omitted). *See also Federal Power Commission v. Sierra Pacific Power Co.,* 350 U.S. 348, 355 (1956) ["[I]t is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."]

[14] *AT&T Communications Contract Tariff No. 360,* 11 FCC Rcd 3194, 3202-3203 (1995) (citations omitted).

Significantly, when assessing the "equities of the particular situation," the Commission has accorded customer expectations substantial weight. It has found, for example, that "the mere fact that AT&T would make less money" when customers converted to a lower tariffed rate "did not constitute an injury to AT&T that outweighed the existing customer's expectation of stability."[15]

The Commission's conclusory public interest "finding" does not constitute "substantial cause," as the Telecommunications Resellers Association contends.[16] That unsubstantiated assertion fails to satisfy both the standards applicable to "reasoned decision-making" and the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., which govern the rulemaking process. In its July, 1997 opinion vacating and remanding portions of the *Payphone Order,* the United States Court of Appeals for the District of Columbia chastised the Commission for an *"ipse dixit* conclusion" that, "coupled with [a] failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking."[17] The bald assertion of a "public interest" benefit associated with contract abrogation appears subject to comparable charges.

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[15] *Id.* at 3202, discussing *AT&T Communications, Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 2404 and 2535,* 5 FCC Rcd 6777 (1990).

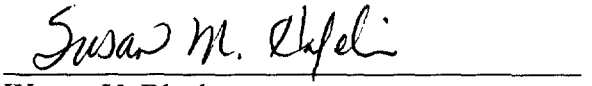
[16] TRA Comments at 7.

[17] *Illinois Public Telecommunications Ass'n v. FCC,* No. 96-1394, slip op. at 15 (D.C. Cir. July 1, 1997) .

WHEREFORE, PREMISES CONSIDERED, the Commission should grant the American Petroleum Institute's Limited Petition for Reconsideration and not authorize carriers to abrogate existing contracts with customers.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE



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CERTIFICATE OF SERVICE

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